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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 472

CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL NO. 200, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Citations to opinions below	2
Jurisdiction	2
Question involved	2
Statutes involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	8
Appendix "A"	9
Appendix "B"	10
Appendix "C"	40

Cases Cited.

Algoma Plywood & Veneer Co. v. WERB, 336 U. S. 301 [Sec. 14 (b)]	7
Local 24 IBT v. Oliver, 358 U. S. 283, 296	7
Meade Electric Co. v. Hagberg, 159 N. E. (2) 408	7
NLRB v. General Motors Corp., 373 U. S. 734	7
Racine Millwork and Supply Co., WERB Dec. 6526-B, 57 LRRM 1168 (1964)	4
Retail Clerks Int. Assoc. v. Schermerhorn, 373 U. S. 746, 757	7
Retail Clerks Int. Asso. v. Schermerhorn, 375 U. S. 96	5, 6

Schermerhorn v. Retail Clerks, 141 So. (2) 269 7

Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448 7

Statutes Cited.

National Labor Relations Act:
Sec. 7 2
Sec. 8 (b) (2) 2
Sec. 8 (a) (3) 2
Sec. 14 (b) 7
28 U. S. C., Sec. 1254 (1) 2
Wisconsin Statutes:
Sec. 111.06 (1) (c) 1 2

Miscellaneous.

Bureau of National Affairs, "Collective Bargaining Negotiations and Contracts", Binder No. 1 6

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 27, 1966.

CITATIONS TO OPINIONS BELOW.

The decision and order of the National Labor Relations Board are reported at 155 NLRB No. 31 (R. 106-132)[1] and are printed in Appendix "B", *infra*, pages 10-39 of this petition.

The court below issued no opinion but affirmed the decision of the Board *per curiam*. The judgment of the court is printed in Appendix "A", *infra*, page 9 of this petition.

JURISDICTION.

The judgment of the court below was entered on May 27, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION INVOLVED.

Whether the National Labor Relations Board had subject matter jurisdiction to hold that two employees were illegally discharged for not maintaining union membership as required by the terms of a collective bargaining agreement valid under federal law but which allegedly failed to satisfy the requirements of state law.

STATUTES INVOLVED.

The federal statutory provisions involved are Sections 7, 8 (b) (2), and 8 (a) (3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Section 151 *et seq.*, referred to as the "Act"). The Wisconsin statute involved is Section 111.06 (1) (c) 1. The federal and state statutes are printed in Appendix "C", *infra*, pages 40-43 of this petition.

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[1] "R." refers to the printed Joint Appendix filed in the court below.

STATEMENT.

Petitioner, Chauffeurs, Teamsters and Helpers "General" Local 200, is the collective bargaining representative for truck drivers employed by the members of the Allied Construction Employers Association, an employer association located in Milwaukee, Wisconsin. State Sand and Gravel Company and Hillview Sand and Gravel Company, the employers of the two charging parties, are members of the Association and both are parties to labor agreements with the Union. The employers were never charged with violating the Act.

Petitioner has had continuous collective bargaining agreements with ACEA or its predecessor association since prior to May 5, 1939, and each agreement contained a union-security provision which required membership as a condition of continued employment (Appendix "B", *infra*, pages 15-16, R. 18, 59, 103).

The recent contracts negotiated between the Association and the Union compelled employees to become and remain Union members as a condition of employment after the thirty-day grace period required by federal law. It also contained the following sentence:

> "The provisions of this subsection shall not be enforced unless the requirements of state law, **if any**, are met." (Emphasis ours.)

The Union consistently maintained, at all material times, that there were **no** state law requirements that barred enforcement of this contract to these two employees.

Under Wisconsin law, union membership may be compelled by contract only if one of the following three conditions are met:

> (a) There has been a separate referendum in which two-thirds of the employees authorize the agreement;

(b) Contracts compelling membership have been in existence since May 5, 1939 (the effective date of the state law);

(c) The employees involved are employed in the building and construction industry and perform work on construction sites (added in 1961).

No referendum was conducted until August, 1963. However, the position of the Union, constantly maintained through the years, was that no referendum was required because the parties had been in a continuous contractual relationship on this subject since 1939.[2]

The Union also asserted that the employees were working in the construction industry within the meaning of state law, but there has been no construction of this 1961 amendment by the state agency.

In 1963, the Petitioner and the Employer Association stipulated to a referendum. On August 21, 1963, the Wisconsin Employment Relations Board certified that the employees had voted 360 to 44 in favor of the all-union agreement (Appendix "B", *infra*, page 24, R. 88-89).

On October 4, 1963, the Petitioner notified all delinquent employees to come to the Union office and make arrangements for reinstatement to membership or a request for their discharge would be made (Appendix "B", *infra*, page 25, R. 91). Neither of the two charging parties responded to the letter within the one week deadline. In fact, neither of the employees had made any tender whatsoever after the referendum and prior to the letter requesting their discharge. Nevertheless, the Board found

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[2] If this fact were found by the state agency (Wisconsin Employment Relations Board), there would have been no violation of state law, nor, under the Board's theory, of federal law either. *Racine Millwork and Supply Co.*, WERB Dec. 6526-B, 57 LRRM 1168 (1964).

that the requests for the discharge of these two men were based upon a dues delinquency dating from 1959, a period prior to the referendum (Appendix "B", *infra*, page 16). The Board rejected Petitioner's contention that it could legally insist on these dues which accrued prior to the referendum because of operation of state law. The Board found that the parties *intended* to defer the effective date of the compulsory union membership provisions of the Agreement until a referendum was held (Appendix "B" *infra*, page 16). The Board held that this "intention" to defer enforcement of the clause rendered it ineffective and the discharges under it were untimely and, therefore, illegal.

REASONS FOR GRANTING THE WRIT.

The critical finding by the Board is that by their reference to state law, the parties "intended" to defer the effectiveness of the union-security agreement until the state referendum was conducted. However, the reference to the state law on this special subject matter of compulsory unionism requires the federal agency to eschew jurisdiction in favor of the state agency. *Retail Clerks Int. Asso. v. Schermerhorn*, 375 U. S. 96.

While it is true that the parties to a collective bargaining agreement may defer its effectiveness to a future date, or make its enforcement contingent upon certain events, when the selected contingency is application of *state* law, established federal policy requires the *state* agencies to discern and interpret the state law.

To find a violation of law, it was essential for the National Labor Relations Board not only to find the intention of the parties, but also to construe and apply state law. The Board stated that "[U]nder Wisconsin law, an employer and a union may not enter into an all-Union, i. e., a union-security agreement, unless two-

thirds of the employees involved who vote approve such agreement" (Appendix "B", *infra*, page 12).

This was an erroneous construction of state law and it also runs contrary to the decision of this Court in *Retail Clerks Int. Asso. v. Schermerhorn*, 375 U. S. 96. In that case, this Court said (375 U. S. at p. 103):

> "It is argued that if there is a violation of a state union-security law authorized by § 14 (b), it is a federal unfair labor practice and that the federal remedy is the exclusive one. It is urged that that course is necessary, if uniformity is to be achieved. But § 14 (b) gives the States power to outlaw even a union-security agreement that passes muster by federal standards. *Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington*" (emphasis ours).

The effect of the Board decision is far reaching because it opens the door to conflicting interpretations of state law by federal and state tribunals at a time when the trend in collective bargaining is to negotiate agreements with single employers and associations of employers which have application in many states.[3] Compulsory membership is an integral part of these agreements and constitutes a potential source of conflict where differing views find expression in state laws. The addition of a qualifying sentence, such as that used in this agreement, soothes

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[3] The following contracts, reproduced in text by the Bureau of National Affairs, "Collective Bargaining Negotiations and Contracts", Binder No. 1, contain similar references preserving the application of state law to union security agreements: *General Motors and UAW*, Title 20: p. 302, Section 4 (b); *Goodyear Co. and Rubber Workers*, Title 21: p. 904, Section 3; *U. S. Steel and Steel Workers*, Title 22: p. 147, Section 5 (A) [31 b] and [31 c]; *National Master Freight Agreement and Teamsters*, Title 27: p. 734, Article 3, Section 1 (b).

local legal objections by permitting application of local policy to this one subject matter. Until such time as Section 14 (b) of the Act is amended or repealed, this jurisdiction must be respected and federal power over the subject matter withheld.

State regulation or interference with the making or enforcement of collective bargaining agreements in industries which affect interstate commerce is not permitted because the federal government has pre-empted this field. *Local 24 IBT v. Oliver,* 358 U. S. 283, 296; *Textile Workers Union of America v. Lincoln Mills,* 353 U. S. 448.

However, one provision of the agreement remains subject to state regulation—that involving compulsory unionism. *Algoma Plywood & Veneer Co. v. WERB,* 336 U. S. 301 [Sec. 14 (b), Appendix "C", *infra,* page 42].

In Wisconsin, it is the referendum problem which must be met in negotiations. In some states, it is the "agency shop" problem which must be discussed and satisfied. In Indiana, it may be negotiated and enforced under state law. *Meade Electric Co. v Hagberg,* 159 N. E. (2) 408. Cf. *NLRB v. General Motors Corp.,* 373 U. S. 734.[4]

In other states, the "agency shop" may not be made compulsory under local law. *Retail Clerks Int. Assoc. v. Schermerhorn,* 373 U. S. 746, 757 [involving the Florida statute, *Schermerhorn v. Retail Clerks,* 141 So. (2) 269]. If the agreement complies with *state* law, there should be no recourse to the federal agency.

The whole confusing and checkered pattern of the application of state law to these agreements could be obviated by congressional action, but such action has not

[4] The state statute which gave rise to this litigation was repealed in 1965.

been taken. Until it is, the states are free to construe and apply their applicable law to the union-security agreements, and parties aggrieved by the application of a union-security agreement, which allegedly fails to meet the requirements of state law, must apply to appropriate state agencies for relief.

The charging parties in the case at bar applied to the federal agency for relief on a problem which involved interpretation and application of the state law. The relief should have been denied and the parties instructed to apply to the appropriate state agency.

CONCLUSION.

For the reasons stated, this petition should be granted.

Respectfully submitted,

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APPENDIX "A".

Opinion of the Court.

(Caption Omitted.)

On Petition to Review and Set Aside, and on Cross-Petition to Enforce, an Order of the National Labor Relations Board.

Before: Bastian, Senior Circuit Judge, and Burger and Leventhal, Circuit Judges.

Judgment.

This case came on to be heard on the record from the National Labor Relations Board and was argued by counsel; and it appearing that substantial evidence on the record as a whole supports the Board's finding that petitioner Union violated Section 8 (b) (2) of the National Labor Relations Act, as amended, by causing Hillview Sand & Gravel, Inc., to discharge employee Fred H. Sinner and by causing State Sand & Gravel, Inc., to discharge and reduce the seniority of employee Arthur A. Dietrich; and it appearing that the Board's proceedings were conducted in accordance with law, it is

Ordered and Adjudged by this court that the Union's petition to set aside the order of the National Labor Relations Board is denied, and the Board's order of October 21, 1965, 155 NLRB No. 31, will be enforced in full.

Pursuant to Rule 38 (b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the judgment of this court.

Per Curiam.

Dated: May 27, 1966.

APPENDIX "B".

Decision of the National Labor Relations Board.

(Caption Omitted.)

Decision and Order.

On January 19, 1965, Trial Examiner W. Gerard Ryan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed an Answering Brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the foregoing exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

1. The complaint alleges, and the Trial Examiner found, that the Respondent violated Section 8 (b) (2) of the Act by causing Hillview Sand & Gravel, Inc., hereinafter called Hillview, to discharge employee Sinner and by causing State Sand & Gravel, Inc., hereinafter called State, to discharge and to reduce the seniority of employee Dietrich.

The Respondent initially contends that the complaint in this proceeding is barred by the 6-month proviso to Section 10 (b) of the Act.[1] The facts relating to this contention are as follows: The Respondent's letters requesting the discharge of Sinner and Dietrich were mailed on October 15, 1963; they were received by the respective employers on October 16; the employees were discharged on October 19 and 21, respectively; the charge was filed on April 13, 1964, and was served on the Respondent on April 16.[2] Thus, while the requests for discharges were mailed outside the 6-month period provided in Section 10 (b), the discharges occurred within the Section 10 (b) period. In **Plumbers & Pipe Fitters Local Union 214 (D. L. Bradley Plumbing and Heating Co.)**,[3] the Board held in a similar factual context that although the respondent union's attempts to cause an employee's discharge began before the 10 (b) period, since the coercion "was clearly efficacious within the 10 (b) period at the time of the discharge", the complaint alleging a violation of Section 8 (b) (2) was not barred by the 6-month limitation. We believe that the **Bradley** decision is controlling in the instant case. Since the Respondent is being charged with unlawfully having **caused** the discharges, it is apparent that the unfair labor practices were not consummated until the discharges took place, which was within the 10 (b) period. Indeed, since here, unlike **Bradley**, the letters requesting

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[1] This provides that:

"... no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made ..."

[2] The Trial Examiner found that the charges were served on April 15. However, the complaint alleges that the charge was served on April 16, and, while the record is not entirely clear on this issue, it appears that in fact the charge was not served until April 16.

[3] 131 NLRB 942, enforced 298 F. 2d 427 (C. A. 7).

the discharges were received by the Employers within the 10 (b) period, the conclusion that the complaint is not barred is even more compelling than in **Bradley**. Accordingly, we find that the complaint is not barred by Section 10 (b).

2. We agree with the Trial Examiner that the Respondent violated Section 8 (b) (2) of the Act by causing the discharges of Dietrich and Sinner.

Hillview and State are engaged in business in and around Milwaukee, Wisconsin, and have been members of the Allied Construction Employers' Association since at least 1959. Since June 1, 1959, the Association has been a party to collective-bargaining agreements with the Respondent which contain a union-security clause, providing, among other things, that its provisions shall not be enforced "unless the requirements of State Law, if any, are met." Under Wisconsin law, an employer and a union may not enter into an "all Union," i. e., a union-security, agreement, unless two-thirds of the employees involved who vote approve such agreement. In August, 1963, following a petition filed by the Respondent with the Wisconsin Employment Relations Board (WERB), a referendum was conducted among the employees of members of the Association. On August 14, the WERB certified that the required number of employees voted in favor of an "all Union" agreement.

Sinner and Dietrich have been employed by Hillview and State, respectively, since 1956 and 1957. Although covered by the Association contracts, they paid no union dues between 1959 and 1963. Shortly before the referendum, each of these employees was approached by the Respondent's shop steward, who mentioned the forthcoming referendum, and stated in substance that if they did not pay their back dues they would be discharged. Sinner made no tender of dues, but Dietrich made an

agreement with the Respondent's steward that on each pay day he would pay whatever he could in back dues. Pursuant to this agreement, and prior to the referendum, Dietrich paid $25 and received a receipt from the Respondent. Shortly after the referendum, Dietrich and Sinner were again told by the stewards that they would lose their jobs if they were not current in their dues. On October 4, 1963, Respondent sent letters to employees, including the two involved herein, informing them that they had been suspended "for non-payment of dues," and directing them to appear at the Union office to avoid losing their jobs. Sinner did nothing in response to this letter and on October 15, the Respondent sent a letter to Hillview requesting Sinner's discharge. On October 17, Sinner appeared at the Respondent's office, offering to pay Ranney, the Respondent's Secretary Treasurer, initiation fees and the dues which he owed from the date of the referendum. Ranney refused the offer and insisted that Sinner would have to pay $330 or be discharged. On October 19, Hillview discharged Sinner.

After receiving the Respondent's October 4 letter, Dietrich tendered $20 in back dues to his steward, who returned it on October 11 advising Dietrich to see Ranney at Respondent's office on October 15. Although appearing at the Respondent's office, Dietrich was unable to see Ranney, and on October 15, the Respondent sent a letter to State requesting the discharge of Dietrich. On the same day Dietrich spoke to Ranney, who made an agreement with Dietrich's attorney, which was later confirmed in writing, that Dietrich was to pay his back dues amounting to $264 at the rate of $25 per month, including dues from November, 1959, "in order for Dietrich to continue his employment." Respondent, however, did nothing to countermand its request for Dietrich's discharge, and he was not called to work on October 21. He was rehired as a new employee on October 24 and worked until No-

vember 12, when, because of his low position on the seniority list, he was laid off.

We find initially, in agreement with the Trial Examiner, that the Respondent's requests for the discharges of Dietrich and Sinner were based on their dues delinquency dating from 1959, and not, as contended by the Respondent, solely on their delinquency for the period beginning on August 14, 1963, the date on which the result of the Wisconsin referendum were certified. In the first place, before the referendum took place, the Respondent's steward told the employees involved that they would be discharged unless they paid their back dues. In addition, the Respondent's letters of October 15 to the Employers requesting the discharges made reference to the fact that these employees had been suspended from the Union for non-payment of dues. Since, under the Respondent's by-laws, an employee could be suspended only if he was 3 months in arrears in his dues, and since 3 months had not elapsed between August 14 and October 15, the requests for discharge must have been predicated at least in part on the employees' pre-August 14 dues delinquency. Finally, and most significantly, after the request for Dietrich's discharge, the Respondent wrote to Dietrich's attorney stating that he owed $264 in dues, that the amount included dues from November 1959, and that "in order for Dietrich to continue his employment" at State, he would have to pay back dues at the rate of $25 a month. Also, the Respondent refused Sinner's offer to pay initiation fees and dues owed from the date of the referendum and it insisted that he pay $330 or be discharged, which sum obviously included dues which had accrued prior to the referendum.[4] In view of these facts and on the basis of the record as a whole, we find that

[4] At the time of the referendum, the Respondent's monthly dues were $7.00, including "a $1.00 per month fine for all delinquent months," and its initiation fee was $50.00.

the Respondent's requests for the discharges of Dietrich and Sinner, which did not distinguish between the employees' liability for back dues and current dues, were based in substantial part on their dues delinquency for the period prior to August 14, 1963.[5]

Without reaching the question whether the Respondent could lawfully require dues for the period preceding the certification of the results of the Wisconsin referendum, the Trial Examiner found that the Respondent's requests for discharge were unlawful because they were based in part on the fact that the employees involved did not pay dues for the period between June 1 and August 16, 1962, when, in the view of the Trial Examiner, there was no union-security agreement in effect, and because the employees involved did not pay "fines" of $1 for each month after they were 3 months in arrears. We consider it unnecessary to pass upon the Trial Examiner's findings respecting the Respondent's right to collect the alleged "fines" and dues for the period between June 1 and August 16, 1962, because, in our view, the requests for discharges were unlawful in any event for the following reasons. We have already noted that the union-security clauses in the bargaining agreements between the Association and the Respondent explicitly provided that they would not be enforced "unless the requirements of State Law, if any, are met;" that, under Wisconsin law, union-security agreements were not permitted unless approved by two-thirds of the employees in the unit; and that it was not until August 14, 1963, that WERB certified that the employees of the members of the Association approved the union-security agreement. Notwithstanding these facts, the Respondent contends that the union-security agreements were enforceable in Wisconsin even before the referendum because they came within the provisions in

[5] See **National Lead Company**, 106 NLRB 545.

the Wisconsin law exempting union-shop agreements covering employees primarily in the construction industry and those which had been continuously in effect since May 5, 1939. However, the Respondent petitioned the WERB for the referendum which would validate these union-security agreements and the Respondent did not ask the Employers to discharge delinquent employees until after the referendum had taken place. In view of these circumstances, including the terms of the union-security agreement and the fact that the Respondent itself acted on the premise that its union-security contracts were not exempted from the requirements of the Wisconsin statute, we find that it was the contractual intent of the parties to defer the operation and enforceability of the union-security clause until the requirements of the Wisconsin statute had been met, and this did not occur until August 14, 1963.[6] As we have found that the Respondent's requests that Dietrich and Sinner be discharged were based in substantial part on their pre-August 14 dues delinquency, we find, in agreement with the Trial Examiner, that such request violated Section 8 (b) (2).[7]

We further find that the Respondent violated Section 8 (b) (2) by causing the discharge of employee Dietrich for the following additional reasons. As described more fully above, after it requested Dietrich's discharge, the Respondent agreed that Dietrich could continue his employment at State if he paid his back dues at the rate of $25 a month but thereafter the Respondent did nothing to countermand its request for Dietrich's discharge. In **Colgate Palmolive Company**, 138 NLRB 1037, a majority of the Board distinguished **General Motors, Packard Elec-**

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[6] Cf. **Malleable Iron Works**, 150 NLRB No. 84.

[7] **John I. Paulding, Inc.**, 142 NLRB 296, 300, footnote 3; **John I. Paulding, Inc.**, 130 NLRB 1035, enfd. 297 F. 2d 272 (C. A. 1).

tric Division, 134 NLRB 1107,[8] and held that the Respondent union violated Section 8 (b) (2) by causing the discharge of an employee where, after the request for discharge, the Union accepted payment of his back dues. Although Chairman McCulloch and Member Brown dissented in **Colgate** and would have found that the Union did not waive its conceded right to assert dues delinquency as a ground for discharge, they deem the instant case distinguishable from **Colgate**. There, the employee tendered her dues to a clerk in the Union office; the clerk did not make an entry of timely payment in the employee's dues book; and the clerk did not tell the employee that termination of her membership was rescinded but rather gave the employee notice to appear before the union grievance committee. Here, however the employees dealt directly with an officer of Respondent, i. e., its secretary-treasurer; the Respondent expressly agreed that Dietrich could keep his job if he paid his back dues on a monthly basis; and Dietrich's attorney made one $25 payment to the Respondent on Dietrich's behalf, around the end of October, 1963. In view of these circumstances, we find that by its request to discharge Dietrich, the Respondent violated Section 8 (b) (2).

Amended Conclusions of Law.

3. By causing Hillview to discriminate in regard to the hire and tenure of employment of Sinner by terminating his employment on October 19, 1963, in violation of Section 8 (a) (3) of the Act, the Respondent has violated Section 8 (b) (2) of the Act.

4. By causing State to discriminate in regard to the hire, tenure of employment, and other terms and condi-

[8] In **General Motors**, the Board held that an employee tender of back dues after the union requests his discharge for dues delinquency will not prevent a lawful discharge.

tions of employment of Dietrich by terminating his employment on October 21, 1963, and, as a result of such termination, rehiring him as a new employee on October 24, 1963, and thereby reducing his seniority, further resulting in his layoff on November 12, 1963, because of such reduction, in violation of Section 8 (a) (3) of the Act, the Respondent has violated Section 8 (b) (2) of the Act.

Order.

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Chauffeurs, Teamsters and Helpers "General" Local No. 200, affiliated with International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order. Dated, Washington, D. C., October 21, 1965.

/s/ Frank W. McCulloch, Chairman,
/s/ Gerald A. Brown, Member,
/s/ Sam Zagoria, Member,
(Seal) National Labor Relations Board.

INTERMEDIATE REPORT.

Statement of the Case.

This proceeding was held before Trial Examiner W. Gerard Ryan at a hearing in Milwaukee, Wisconsin, on September 2-3, 1964, on the complaint of General Counsel as amended at the hearing and the answer of Chauffeurs, Teamsters and Helpers "General" Local No. 200 herein called the Respondent. The issue litigated was whether

the Respondent violated Section 8 (b). (2) of the Act.[1] The parties waived oral argument. The General Counsel and the Respondent have filed briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings and Conclusions.

I. The Business of the Employers.

Hillview Sand and Gravel, Inc., herein referred to as Hillview is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of Wisconsin.

State Sand and Gravel Company herein referred to as State is and has been at all times material herein a corporation duly organized and existing by virtue of the laws of the State of Wisconsin.

At all times material herein Hillview has maintained its principal office and place of business at 20695 West National Avenue in the city of New Berlin, State of Wisconsin, herein called Hillview plant and is and has been at all times material herein engaged at said plant and location in the manufacture, sale and distribution of sand and gravel and related products.

At all times material herein State has maintained its principal office and place of business at 10833 West Watertown Plank Road in the city of Milwaukee, State of Wisconsin, herein called the State plant and is and has been at all times material herein engaged at said plant and location in the business of mining and the manufacture, sale and distribution of concrete and related products.

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[1] The charge was filed on April 13, 1964; and was served on the Respondent on April 15, 1964. The complaint issued on June 4, 1964.

During the past year Hillview in the course and conduct of its business operations purchased, transferred and delivered to Hillview plant sand, gravel and other goods and materials valued in excess of $75,000 of which goods and materials valued in excess of $50,000 were received from other enterprises located in the State of Wisconsin which other enterprises had received said goods and materials directly from States other than the State of Wisconsin.

During the past year State in the course and conduct of its business operations purchased, transferred and delivered to State plant trucks and other equipment and goods and materials valued in excess of $75,000 of which trucks, equipment, goods and materials valued in excess of $50,000 were transported to said plant from and received from other enterprises including *inter alia* International Harvester Company and Rex Chain Belt Company located in the State of Wisconsin which other enterprises had received the said goods and materials directly from States other than the State of Wisconsin.

State and Hillview are and have been at all times material herein members of the Allied Construction Employer Association, an association organized for the purpose, *inter alia,* of engaging in collective bargaining on behalf of its members.

During the past year the various members of the Allied Construction Employers Association, all located within the State of Wisconsin, have purchased, transferred and delivered to their respective facilities within the State of Wisconsin in excess of $50,000 worth of goods and materials from points outside the State of Wisconsin.

Hillview, State and Allied Construction Employers Association are now and have been at all times material herein each individually and all collectively an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved.

Respondent is and has been at all times material herein a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices.

The complaint alleged and the answer denied that on or about October 18, 1963, the Respondent caused or attempted to cause Hillview to discharge employee Fred H. Sinner and State to discharge and/or reduce the seniority of Arthur A. Dietrich because they failed and refused to pay dues to Respondent for a period during which there was no valid union security agreement as required by Section 8 (a) (3) of the Act.

The complaint was amended at the hearing to allege that Respondent on or about October 18, 1963, caused or attempted to cause Hillview to discharge Sinner and caused or attempted to cause State to discharge or reduce the seniority of Dietrich because they failed to pay fines to the Respondent.

Respondent objected to the amendment of the complaint on the ground that there is nothing in the charge to sustain or permit the amendment to the complaint and therefore the amendments are barred by Section 10 (b) of the Act. The Respondent further contended that there is no charge that alleges the facts alleged in the amendments; that there is no charge even remotely referring to the question of fines; and by such amendment the question of fines completely changes the General Counsel's theory in the original complaint which the Respondent asserts is different from the question of fines as the night from day. I permitted the amendment of the complaint.

Since the charge was served on April 15, 1963, the 6-month period under Section 10 (b) of the Act began on

October 15, 1963.[2] I find no merit in the objection by the Respondent that the complaint is barred by Section 10 (b) of the Act. The letters from the Respondent requesting the discharges were mailed on October 15, 1963, and received by Hillview and State on October 16.

Respondent is the collective-bargaining representative of the truck-drivers, warehousemen and helpers employed by the members of the Allied Construction Employers Association. Hillview and State the respective employers of Sinner and Dietrich are members of the above association and are parties to the collective-bargaining agreement between the association and Respondent.

The collective-bargaining agreement presently in effect was executed on August 6, 1962, with a term extending to May 31, 1968. The preceding agreement had terminated on May 31, 1962, and at the expiration of that agreement a strike had occurred. Respondent has had a collective-bargaining relationship with the building industry in Milwaukee since 1938 and contracts with it each year since then.

The current labor agreement between Respondent and the association contains, *inter alia*, the following provisions:

ARTICLE II.

Recognition and Security Section 1.

(a) . . .

(b) All present employees who are members of the Union on the effective date of this subsection shall remain members of the Union in good standing as a condition of employment. All present employees who were not members of the Union and all employees who are hired hereafter shall become and remain members

[2] **Local 369, IBEW**, 143 NLRB 1297, 1301 (obviously November 11, should read October 11, in line 6, page 1301).

in good standing of the Union as a condition of employment on and after the 31st day following the effective day of this subsection, whichever is later. The provisions of this subsection shall not be enforced unless the requirements of the State law, if any, are met.

Wisconsin law requires that before a union and an employer may enter into an "all Union" agreement, a referendum must be held wherein a two-thirds majority of employees voting approve such an agreement. (Wisconsin Administrative Code Section ERB 111.06 (1).) The amended statute further provides that any "all Union" contract in existence on May 5, 1939, and renewed or amended continuous since that time shall be deemed valid and enforceable in all respects. The amended statute continues "It is not a violation of any provision of this chapter for an employer engaged primarily in the building and construction industry where the employees of such employer in a collective-bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce an all union agreement with a labor organization which has not been subject to a referendum vote as provided in this subchapter."

The Respondent in its answer asserted that the National Labor Relations Board lacks jurisdiction over the subject matter of the issue raised in the charge and complaint. The General Counsel contends that the union security agreement between Respondent and the association, binding Hillview and State, by its terms, could not be enforced or applied until the requirements of State law had been satisfied. The Respondent contends that under Wisconsin law a referendum was unnecessary in view of the fact that the contracts with union security provisions were valid under Wisconsin law without a referendum. The Respondent claims that it did not have the obligation to participate in the referendum which

was held in 1963 and that the agreement was in continuing compliance with State and Federal law at all times material to this proceeding.

I find it unnecessary to make any finding which requires interpretation of State law that the collective-bargaining agreement was or was not legal prior to the referendum in August 1963. It is sufficient for the purposes of this case that the Respondent was demanding dues at least for a period from June 1, 1962, to August 6, 1962, during which time there was no collective-bargaining agreement in effect. Whether or not the Respondent is legally entitled to dues under the union security provision in prior contracts antedating the referendum is a matter for the proper State tribunals. A union may impose dues, initiation fees, fines, etc. as to its membership but under Board case law may not condition employment rights on payment of fines. In short, this case as hereinafter found presents the situation where the Respondent sought and obtained the discharges of Sinner and Dietrich for nonpayment of fines and for nonpayment of dues for a period during which no collective-bargaining agreement was in existence (June 1, 1962 to August 6, 1962).

In August 1963, the first Wisconsin Employment Relations Board referendum on the question of an all union agreement was held among the employees of the association. The vote favored the all union agreement and that result was certified on August 14, 1963.

Prior to October 15, 1963, neither State nor Hillview had been requested by Respondent to enforce any union-security agreement through the discharge of nonmember employees.

Fred H. Sinner began working for Hillview as a truck-driver in 1956. He was a member of Local 695 Teamsters when he started this employment. Sometime in 1958 he transferred to Respondent Local 200.

Sinner paid dues to the Respondent for about 10 months. The last time he paid any dues to the Respondent (except for an occasional payment) was in October 1959.

As of October 1963, Sinner according to Respondent's computations was approximately $330 in arrears. That amount was computed as follows: Prior to December 1, 1961, Respondent's dues were $5 per month if paid currently and $6 per month if 3 or more months in arrears; after January 1, 1962, the dues were $6 per month and $7 per month if delinquent. The dues Sinner allegedly owed included the $1 per month increase because he was in arrears.

About 2 weeks before the referendum Sinner had a conversation with Respondent's steward at Hillview. Moczynski the steward told Sinner in a conversation about the referendum "you better pay up your union dues if you intend to keep on working here." In the week following the referendum Moczynski told Sinner that unless he paid up his back dues he probably wouldn't be able to work at Hillview any longer.

On October 4, 1963, Respondent sent letters to those employees who had failed to pay dues informing the employees that they had been suspended for nonpayment of dues and told them to report to the union office within a week to avoid losing their jobs. The letter was signed by Ranney, secretary andd treasurer of the Local.

On October 15, 1963, Respondent sent Hillview, Sinner's employer, a letter requesting Sinner's discharge.

On October 18, 1963 (Friday), a day on which he worked Sinner was informed by his employer Mr. Bartelt that Hillview would have to send him a letter of discharge. On October 19, 1963, Sinner received a letter from Hillview stating:

> Under date of October 15, 1963, we received a letter from Local 200 of the Teamsters' Union advising us you had been suspended and instructing us to remove you from our employment. Because of our union contract, and the recent referendum of Local 200, we are hereby permanently discharging you from our employment effective October 21, 1963.

About a week following the referendum Sinner testified that Steward Moczynski asked him why he did not go down and pay up his dues and that Sinner replied that he would not pay them. Moczynski replied that he probably would not be able to work there any longer if he did.

Sinner testified that on September 27, he went to the union hall and asked for Ranney. He was told he was not in and Sinner testified he returned the next day. Sinner continued to testify that on October 7, 1963, he went to the union hall in the neighborhood of 3 or 3:30 or 4 o'clock in the afternoon.[3] He testified he asked Ranney "What this business of back dues was all about;" that Ranney explained he would have to pay $330 or he probably would be discharged. Sinner testified he told Ranney he did not think they were entitled to those dues and told Ranney he would pay an initiation fee plus dues back to the referendum. Sinner testified that Ranney said he could not accept that; he would have to pay $330. Sinner continued to testify that he worked on October the 18th and one of his employers, Mr. Bartelt, mentioned he would have to send him a letter of discharge. Between 3 and 4 p. m. that afternoon after Bartelt had spoken to him Sinner testified he told Moczynski that he had got the letter and Moczynski advised him to go

[3] Later in his testimony Sinner admitted that it is possible that October 17 was the only day he punched out early and went to the union office arriving there after 3 p. m. and talked to Ranney for the first time. Ranney testified October 17 was the only time he saw Sinner at the union office.

to the union office. Sinner thereupon went to the union office and offered to pay Johannes an initiation fee plus dues back to the referendum but Johannes said he owed $330 and could not accept.[3a] Sinner continued to testify that he received a letter from the employer on October 19, concerning his discharge; that he went to the union office three times on October 21, and told Johannes he would pay the initiation fee plus dues back to the referendum but Johannes said he could not accept it. When Johannes said that Sinner had to pay $330 Sinner replied that he would not buy the job. Sinner testified that he saw Johannes on two further occasions that day at the union hall and again repeated his offer to pay an initiation fee and dues back to the referendum but Johannes said there was nothing he could do for him unless he paid the $330; whereupon Sinner walked out. Sinner testified that he had **no conversations with Johannes until after he was discharged.** At one part of his testimony he denied that it was not until after he was discharged that he saw Ranney. From the record it can be established that the first time that Sinner saw Ranney was on October 17, 1963. Ranney testified that on October 17, 1963, Sinner came to the office but did nothing but rave and rant about the illegality of the referendum and Ranney ordered him to leave. Ranney testified that Sinner did not make any offer to pay his dues. On further cross-examination by the Respondent when called during the presentation of the Respondent's case, Sinner testified that it is possible October 17, 1963, was the only day he punched out early and went to the union office, arriving there sometime after 3 o'clock in the afternoon and talked to Ranney for the first time. Thus, I find that on the basis of Ranney's testimony and Sinner's concession that October 17 was the first time Sinner

[3a] "Clarence Johannes was a business representative of Respondent."

talked to Ranney, which would be 2 days after the Respondent's letter requesting his discharge was sent. I credit Sinner's testimony that Ranney told him on October 17, 1963, that Sinner would have to pay $330 or he probably would be discharged and that Ranney said he could not accept Sinner's offer to pay initiation fees plus the dues back to the referendum.

Arthur Dietrich began working for State in the spring of 1957 as a driver. Some time after he became employed by State he joined the Respondent, paid his initiation fee and a couple of months' dues. However, from 1959 until June, 1963, Dietrich paid no money to the Union. His arrears were known to the Union before the WERB referendum but Respondent did nothing to seek Dietrich's discharge until after the referendum.

The dues of $264 by which Dietrich was in arrears included the $1 additional per month by which dues are increased when 3 or more months are in arrears.

During the first part of June, 1963, Dietrich was told by the Union Steward, Michael O'brenovich that the vote on the union shop question was possibly coming up and that all men should pay up their dues because if it was voted in as a union shop "the fellows that weren't paid up and had made no arrangements with the Union would probably be dropped out of their jobs or bumped down." Dietrich testified that he asked O'brenovich if he could just pay an initiation fee.

Dietrich made an agreement with O'brenovich to pay whatever he could each payday on the back dues. O'brenovich told him that "it was agreed upon from the Union." Prior to the referendum Dietrich gave $25 to O'brenovich for the Union in two payments. One payment for $10 and one payment for $15 which O'brenovich took to the Union, procured a receipt, and gave the receipt to Dietrich.

During the first part of September 1963, Dietrich was told by O'brenovich that the union shop had been approved and that "all the fellows that were paying the back dues had to be caught up or they would either be laid off or bumped out of the Union."

After the second conversation with O'brenovich, Dietrich gave the steward a total of $20 which O'brenovich took to the Union on October 8, 1963, and learned that the Union would not accept it. He was told that Dietrich would have to go to the Union himself. O'brenovich returned the $20 to Dietrich on October 11, and told him to go down to the Union and see Ranney on the following Tuesday at the meeting. It did not occur to Dietrich, according to his testimony, to go immediately to the Union because the steward had told him to see Ranney on October 15.

Dietrich did not receive a copy of the Respondent's letter of October 4, 1963, addressed to those members who were in arrears but other employees showed him a copy of it sometime between October 4, and October the 11th according to Dietrich's testimony.

Dietrich continued to testify that on the evening of October 15, 1963, he went to the Respondent's office as the steward had told him to do where he found a meeting was in progress. Dietrich asked for Ranney but was told he was not in but would be in the next day. Dietrich said he would return the following day.

Under date of October 15, 1963, Respondent sent State a letter requesting that they discharge Arthur Dietrich because he was not a member of the Union.

On the morning of October 16, 1963, Dietrich went to Respondent's office and had a conversation with Ranney. Ranney asked him what he could do about paying his back dues. Dietrich informed him that he was under

amortization and gave him the name of his attorney Thomas McGinn.

Ranney called McGinn on the telephone and made an agreement for Dietrich to pay off his union dues at the rate of $25 per month. Ranney's agreement with McGinn, for Dietrich, was confirmed in writing at McGinn's request. That letter (G. C. Exhibit 9) states:

> This is to confirm our conversation of this morning wherein I explained to you that Arthur A. Dietrich an employee of State Sand and Gravel is in arrears in its dues in the amount of $264. In order for Mr. Dietrich to continue his employment with State Sand and Gravel Company, it will be necessary that he pay this arrears in monthly installments at not less than $25 per month.
>
> In addition to the monthly installments Mr. Dietrich will have to pay his current dues which because of the arrears amounts to $7 per month.

McGinn also requested and received from Respondent a verification of the sum owed. That verification is in evidence as General Counsel's Exhibit No. 6 indicating that Dietrich owed a total of $264 in dues from November 1959, and stating in the last paragraph:

> The above amounts are including a $1 per month fine for all delinquent months except the current month of October. This member will be charged these assessments until he has paid up to date in the current month.

Attorney McGinn made one $25 payment to the Union on Dietrich's behalf around the end of October 1963. Around the middle of October 1963, State received a copy of Respondent's letter requesting discharge of Dietrich. Respondent did nothing to countermand this request notwithstanding the arrangement made with Dietrich for

the payment of back dues. Dietrich worked all day on October 18, 1963. However he did not receive his starting time for the following Monday as was usual practice. On Monday, October 21, Dietrich waited at home for a call to go to work. Failing to receive the call he telephoned the head dispatcher and asked what was wrong and was told that he had been laid off because he had not been cleared by the Union. Dietrich then called Walter Retzlaff, State's superintendent and Retzlaff repeated what the dispatcher had told him. Retzlaff testified the only reason for discharging Dietrich was the letter requesting his discharge from the Respondent.

Dietrich then went to see Retzlaff and was told that if he wanted to come back he would have to do so as a new man because the Union had demanded his layoff. Dietrich returned to work at State, as a new employee, having lost all of his seniority on October 24, 1963. He worked until November 12, 1963, and was then laid off for the rest of the season. It is uncontradicted in the record that had Dietrich not lost his seniority he would not have been laid off at that time.

Conclusions.

Sinner did not make any offer to pay his dues until October 17, 1963, assuming, *arguendo,* that he did on that date. His testimony that he offered to pay the initiation fee of $50 plus $6 dues from 30 days after the referendum is squarely contradicted by Ranney. In any event such tender would be too late as made after the Union's request for his discharge had been made by the Union and received by the Employer, **if the Union's request for discharge were lawful and solely for the reason of dues delinquency.** In **General Motors Corporation,** 134 NLRB 1107, the Board held at 1109 that an employee was delinquent in the payment of dues at the time the Union requested his discharge solely because of such delinquency; and if the Company had discharged him immedi-

ately upon receipt of the Union's request the legality of both the request and the discharge could not have been questioned. In that case the Board held that the Union requested the discharge at a time when and solely because the employee was delinquent in the payment of his dues; and that thereafter the employee offered to pay the Union the amount of its delinquency which offer the Union refused to accept and the Company thereafter discharged him. The Board, overruling the **Aluminum** case[4] held that since the reason for the requested discharge was solely for dues delinquency and the offer to cure the delinquency was made only after such request for discharge there were no violations of Section 8 (a) (1) and (3) and 8 (b) (1) (A) and (2) of the Act.

In the case at bar the question now presented is whether the complaint should be dismissed on the authority of the **General Motors** case, *supra*, or whether this case is to be distinguished because of the fact that the "dues" delinquency also included monthly fines of $1 for each month after 3 months' delinquency and for the period June 1-August 6, 1962, which was not covered by a union-security agreement. The Union denied in its answer that it requested the discharges for unpaid dues prior to the referendum and the Respondent's brief (p. 17) contends that its Secretary-Treasurer Ranney has denied under oath that either of the Charging Parties was discharged for failure to pay anything owing prior to the August referendum.

Frank H. Ranney when called under Rule 43 (b) by the General Counsel testified in part as follows:

> Q. To your knowledge did anyone from Local 200 or yourself ask Mr. Sinner be discharged for failure to pay dues at anytime prior to August 6, 1963?
>
> A. No.

* * * * * * * *

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[4] 112 NLRB 619, 621.

Q. To your knowledge did Local 200 seek the discharge of Mr. Dietrich for his arrearages in dues prior to August 6, 1963?

A. No.

But Ranney continued to testify that Dietrich as of October, 1963, was in arrears in the amount of approximately $264 and Sinner was in arrears for approximately $330.

If the Union requested the discharges of Sinner and Dietrich solely for dues delinquency between the date of the referendum and October 15, it would be a lawful request and no question of fines would be involved because only $6 in dues for 1 month would be involved plus an initiation fee of $50.

Since the amount of dues after referendum would be $6 and an initiation fee would be $50 it is obvious that the discharges of Sinner and Dietrich included monthly dues and fines for months before the referendum which fines were added to the monthly dues after dues were in arrears 3 months and also included the period during which there was no collective-bargaining contract. I find no merit to the Respondent's defense that it requested the discharges of Sinner and Dietrich only for their delinquency in dues following the referendum. This conclusion is fortified by the fact which is uncontradicted that on October 16, the Respondent and Dietrich entered into an arrangement whereby Dietrich was to pay his entire arrears of $264 at the rate of $25 per month until paid plus current dues monthly. Notwithstanding such arrangement although made after the date of the request for discharge was received (October 16, 1963), the Union did nothing to prevent the discharge of Dietrich who following his discharge was rehired as a new employee with loss of his accrued seniority.

The conclusion that the Union was claiming dues prior to August 6, 1963, is further fortified by the fact that in

its letter of October 15, requesting discharge, the Respondent stated to the Employers that Sinner and Dietrich had been "suspended from our union for nonpayment of dues." According to the bylaws of Local 200, Article XIX (letter J), "any member who becomes three (3) months in arrears for dues, fines, etc., shall automatically stand suspended from this local union." Since 3 months had not elapsed between 31 days after August 6, and October 15, it is obvious that the nonpayment of dues[5] did and had to include some part of the period prior to August 6, including June 1 through August 6, 1962, when there was no collective-bargaining agreement. While the Union may have a right to collect back dues and fines, etc. as a debt owing to the organization, it may not condition employment rights on payment of this debt.

In **Pen and Pencil Workers Union**, 91 N. L. R. B. 883, the Respondent requested the Employer to discharge one Becker on the ground that she had failed to pay the outstanding fine and she was discharged. The Board held that by causing the Employer to discharge Becker discriminatorily because she had been denied membership on some ground other than failure to tenure periodic dues and the initiation fees uniformly required by the Respondent as a condition of acquiring or retaining membership there, the Respondent violated Section 8 (b) (2) of the Act.

In **National Lead Company**, 106 N. L. R. B. 545, the discharges were brought about only after the demand for dues was separated from the demand for fines and after the employees were given a fresh and ample opportunity to clear themselves with the Union by tendering their dues alone. The Board held there was no violation of the Act. In the instant case, however, the demand was for discharge for nonpayment of dues but the employees

[5] The Respondent claimed Sinner owed $330 and Dietrich owed $264.

were met with a demand for dues and fines and were not offered an opportunity to clear themselves with the Union by tendering their dues alone.

On the basis of the entire record I find that by requesting and obtaining the discharges of Sinner and Dietrich the real reason for the Union requesting the discharges included nonpayment of fines and also nonpayment of dues for a period during which there was no contract between the Union and the Employers. Accordingly, I find the Respondent thereby violated Section 8 (b) (2) of the Act.

IV. The Unfair Labor Practices.

The unfair labor practices found to have occurred as set forth above, occurring in connection with the operations of Hillview and State, described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy.

In view of my finding set forth above, that the Respondent has engaged in unfair labor practices defined in Section 8 (b) (2) of the Act, I shall recommend that it be required to cease and desist therefrom and take such affirmative action as appears necessary and appropriate to effectuate the policies of the Act. I shall recommend that the Respondent notify Hillview and State in writing and furnish copies thereof to Fred H. Sinner and Arthur A. Dietrich, respectively, that it withdraws its objections to their employment and requests Hillview and State, respectively, to offer them reinstatement. I also recommend that the Respondent make Sinner and Dietrich whole for the loss of earnings suffered as a result of the discrimination against them by payment to each a sum of money

equal to what Sinner and Dietrich would have earned working for Hillview and State, respectively, after October 18, 1963, less net earnings during said period, net earnings to be computed on a quarterly basis as in **F. W. Woolworth Co.**, 90 N. L. R. B. 289, with interest computed as in **Isis Plumbing & Heating Co.**, 138 N. L. R. B. 716. I shall recommend that Respondent post at its regular meeting place copies of the notice attached hereto and marked "Appendix."

On the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law.

1. The Respondent is a labor organization within the meaning of the Act.

2. Hillview and State are employers engaged in commerce within the meaning of the Act.

3. By causing Hillview to terminate the employment of Fred H. Sinner on October 18, 1963, for reasons other than his failure to tender periodic dues and initiation fees, Respondent violated Section 8 (b) (2) of the Act.

4. By causing State to terminate the employment of Arthur A. Dietrich on October 18, 1963, and to rehire him as a new employee on October 21, 1963, thereby reducing his seniority for reasons other than his failure to tender periodic dues and initiation fees, Respondent violated Section 8 (b) (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER.

On the basis of the finding of fact and conclusions of law set forth above, it is recommended that the Respondent be ordered to:

1. Cease and desist from:

Causing or attempting to cause Hillview and State, respectively, to discriminate against any of their employees in violation of Section 8 (a) (3) of the Act.

2. Take the following affirmative action to effectuate the purposes and policies of the Act:

(a) Make whole Sinner and Dietrich for loss of earnings in the manner set forth in the section above, entitled "The remedy."

(b) In the event that any of the above-named employees are presently serving in the Armed Forces of the United States, notify him of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948 as amended after discharge from the Armed Forces.

(c) Notify Hillview and Fred H. Sinner in writing that it withdraws its objection to Sinner's employment and requests Hillview to offer him reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(d) Notify State and Arthur A. Dietrich in writing that it withdraws its objection to his employment and requests State to offer him reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(e) Post at its business office and at all places where notices to members are posted, copies of the notice attached hereto and marked "Appendix."[6] Copies of said

[6] If this Recommended Order be adopted by the Board, the words, "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

notice to be furnished by the Regional Director for the Thirtieth Region, shall, after being duly signed by an authorized official of Respondent, remain posted at the places indicated, for a period of not less than 60 consecutive days. Reasonable steps shall be taken by Respondent to assure that said notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for the Thirtieth Region, in writing, within 20 days from receipt of this Decision, what steps Respondent has taken to comply with it.[7]

Dated at Washington, D. C.

/s/ W. Gerard Ryan,
Trial Examiner.

APPENDIX.

Notice to All Employees Pursuant to the Recommended Order of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

We Will Not cause or attempt to cause Hillview Sand And Gravel, Inc., and/or State Sand and Gravel Company to discriminate against Fred H. Sinner and Arthur A. Dietrich, respectively, or any other employee in violation of Section 8 (a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We Will notify Hillview Sand and Gravel, Inc., and Fred H. Sinner, in writing that we withdraw our

[7] If this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Thirtieth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

objections to his reinstatement to his former or an equivalent position without prejudice to his seniority or other rights and privileges.

We Will notify State Sand and Gravel Company and Arthur A. Dietrich, in writing, that we withdraw our objections to his employment and request his reinstatement to his former or an equivalent position without prejudice to his seniority or other rights and privileges.

We Will make Fred H. Sinner and Arthur A. Dietrich whole for any loss of pay suffered because of the discrimination against them.

Chauffeurs, Teamsters and Helpers, "General" Local No. 200, Affiliated With International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America,
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

APPENDIX "C".

Statutes Involved.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC, Sec. 151 et seq.):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: **Provided,** That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit cov-

ered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further,** That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: **Provided,** That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sec. 14.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Wisconsin Statute.

111.06 *What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

* * * * * * *

(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment. An employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. Such authorization of an all-union agreement shall be deemed to continue thereafter, subject to the right of either party to the all-union agreement to request the board in writing to conduct a new referendum on the subject. Upon receipt of such request by either party to the agreement, the board shall determine whether there is reasonable ground to believe that there exists a change in the attitude of the employes concerned toward the all-union agreement since the prior referendum and upon so finding the board shall conduct a new referendum. If the continuance of the all-

union agreement is supported on any such referendum by a vote at least equal to that hereinabove provided for its initial authorization, it may be continued in force thereafter, subject to the right to request a further vote by the procedure hereinabove set forth. If the continuance of the all-union agreement is not thus supported on any such referendum, it shall be deemed terminated at the termination of the contract of which it is then a part or at the end of one year from the date of the announcement by the board of the result of the referendum, whichever proves to be the earlier date. The board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employe of such employer, and each such all-union agreement shall be made subject to this duty of the board. Any person interested may come before the board as provided in s. 111.07 and ask the performance of this duty. Any all-union agreement in existence on May 5, 1939, and renewed or amended continuously since that time shall be deemed valid and enforcible in all respects. It is not a violation of any provision of this subchapter for an employer engaged primarily in the building and construction industry where the employes of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce an all-union agreement with a labor organization which has not been subjected to a referendum vote as provided in this subchapter.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 472

CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL NO. 200, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. Its *per curiam* order (Pet. 9) is not yet officially reported. The decision and order of the National Labor Relations Board are reported at 155 N.L.R.B. No. 31 (Pet. 10–39).

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1966 (Pet. 9). The petition for a writ

232-342—66

of certiorari was filed on August 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly sustained the finding of the National Labor Relations Board that a union violated Section 8(b)(2) of the National Labor Relations Act by causing the discharge of two employees for non-payment of dues that had accrued prior to the effective date of the union security ("union shop") agreement between the union and the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are printed at pages 40–43 of the petition for certiorari.

STATEMENT

On June 1, 1959, the Allied Construction Employers Association, located in Milwaukee, Wisconsin, entered into a collective bargaining agreement with petitioner union. That agreement contained a union security clause which in terms provided that it would not be enforced "unless the requirements of State law, if any, are met" (Pet. 12). The contract expired on May 31, 1962, at which time the union called a strike (Pet. 22). A new contract, incorporating a union security clause and a proviso identical to the one in the previous contract, was executed on August 6, 1962 (Pet. 12, 22).

Insofar as relevant here, Wisconsin law permits an "all-union" or union security agreement only if there

has been a separate referendum in which two-thirds of the employees authorize the agreement (Pet. 42).[1] The union did not petition the Wisconsin Employment Relations Board for such a referendum until August 1963 (Pet. 12, 24). The election was held on August 6, and on August 14 the Wisconsin Board certified that the employees had authorized an "all-union" agreement (Pet. 12, 24).

Until the union petitioned for the referendum, it had never enforced nor threatened to enforce the union security agreement. However, two weeks before the referendum, employee Sinner, a union member who had stopped paying dues in 1959 and whose arrearage totaled $330, was warned by a union steward that he would be discharged unless he paid his back dues (Pet. 25; J.A. 25).[2] This warning was repeated about a month and a half after the referendum (Pet. 25; J.A. 91, 10–11).

On October 15, the union, by letter, requested Sinner's employer to discharge him in "accordance with our Labor Agreement" (Pet. 25; J.A. 93). On October 18, the employer received the letter and informed Sinner that he was about to be discharged (Pet. 25; J.A. 27). Sinner then went to the union's business

[1] There are two exceptions to the referendum requirement: (1) where the union security agreement has been in continuous existence since May 5, 1939; and (2) where the employees involved are engaged primarily in the building and construction industry and usually perform their duties on building and construction sites (Pet. 43). The Board found that the union, by its own actions, had indicated that these exceptions were inapplicable here (Pet. 15–16).

[2] "J.A." refers to the printed joint appendix in the court below.

office and offered to pay a new initiation fee and dues retroactive to the date of the referendum (Pet. 26; J.A. 28). The union, however, refused to accept less than $330, and the next day Sinner received a letter from his employer stating (Pet. 26; J.A. 28, 29):

> Because of our union contract, *and the recent referendum of Local 200,* we are hereby permanently discharging you from your employment effective October 21, 1963. [Emphasis added.]

Similarly, in June 1963 employee Dietrich, who had not paid union dues since 1959, was told by a union steward that "there would be a vote possibly coming up for an all union shop" and that those who were not paid up would be "dropped" or "bumped down" (Pet. 28; J.A. 74, 43–45). Dietrich agreed to pay his back dues of $264 in installments, and paid $25 before the referendum (Pet. 28; J.A. 45, 53, 75–76). In September 1963 the union steward told Dietrich that the union shop had been approved, and again warned him that he had to pay his back dues (Pet. 29; J.A. 45). Dietrich submitted two payments totalling $20, but they were returned to him on October 11, at which time he was told that this was "not a substantial amount" (Pet. 13; J.A. 46, 77). Several days later, Dietrich spoke to the union's business agent, who agreed to accept monthly installments of $25 from Dietrich's attorney (Pet. 13; J.A. 47). In the meantime, however, the union had requested Dietrich's discharge and it did nothing thereafter to withdraw or rescind the letter (Pet. 13; J.A. 14). Consequently, on October 24, Dietrich was discharged and permitted to return to work only as a "new man,"

i.e., without seniority; he was later laid off for lack of work because of his low seniority (Pet. 13–14; J.A. 48, 17).

The Board, in the light of the terms of the union security agreement itself and the fact that the union had petitioned for the State referendum and had not enforced this and similar agreements until the referendum had been conducted, found that it was the intent of the parties to defer the operation and enforcement of the union security clause until the union was certified by the Wisconsin Employment Relations Board, an event that did not occur until August 14, 1963 (Pet. 16). Since the union refused to accept less than $330 from Sinner and $264 from Dietrich, the Board further found that the union's requests for their discharge were partially based on dues delinquency prior to August 14 (Pet. 14–15). Accordingly, the Board concluded that the union caused Sinner and Dietrich to be discharged and Dietrich's seniority to be reduced because of their failure to pay union dues for a period in which the union security clause under which they were discharged was not in effect, thereby violating Section 8(b)(2) of the Act (Pet. 16).[3] The Board ordered the union to cease and desist from the unfair labor practices found, to recompense the employees for their loss of earnings, to notify their employers that it has no objection to their

[3] The Board found that the discharge of Dietrich was unlawful on the further ground that the union had in effect waived his delinquency and had agreed to permit him to pay his back dues at the rate of $25 per month (Pet. 16–17). The petition does not challenge this alternative basis for the finding respecting Dietrich.

employment, and to post appropriate notices (Pet. 18, 36–39).

The court of appeals sustained the Board's findings and enforced its order (Pet. 9).

ARGUMENT

Section 8(a)(3) of the Act permits an employer and a union to enter into an agreement requiring membership in the union as a condition of continued employment, and an employee subject to such an agreement may be discharged if he does not tender "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (Pet. 40–41).[4] This presupposes, of course, a valid and subsisting union security clause; no discharge may lawfully be effected for a dues delinquency which accrued during any period when a valid clause was not in effect.[5] The only question here is whether the Board properly concluded that the union caused employees Dietrich and Sinner to be discharged for their failure to pay dues to the union during a period when in fact the union security clause in the contract between the union and the em-

[4] If a union causes an employer to discharge an employee in violation of Section 8(a)(3), it is guilty of an unfair labor practice under Section 8(b)(2).

[5] See *National Labor Relations Board* v. *Auto Workers*, 297 F. 2d 272, 274–275 (C.A. 1); *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 839 (C.A. 2); *Colonie Fibre Co., Inc.* v. *National Labor Relations Board*, 163 F. 2d 65, 67 (C.A. 2); *National Labor Relations Board* v. *Auto Workers, Local 291*, 194 F. 2d 698, 702 (C.A. 7); *National Labor Relations Board* v. *Spector Freight System, Inc.*, 273 F. 2d 272, 276 (C.A. 8), certiorari denied, 362 U.S. 962.

ployer was not in effect. An issue of this kind, turning as it does on the facts of this particular case, does not warrant review by this Court.

In addition, it is clear that the Board's conclusion is fully supported by the record. The August 1962 contract, like its predecessor, specifically recited that the union security clause would not be enforced "unless the requirements of State law, if any, are met." In compliance with the requirements of State law, the union petitioned the Wisconsin Employment Relations Board in August 1963 for a referendum to determine whether the employers would authorize such a clause. And the union did not attempt to enforce the union security clause until it invoked the State machinery. In the light of these facts, the Board properly concluded that "it was the contractual intent of the parties to defer the operation and enforceability of the union-security clause until the requirements of the Wisconsin statute had been met" (Pet. 16). Since these requirements were not satisfied until August 14, 1963, and the bulk of the dues sought by the union from Dietrich and Sinner had accrued prior to that date, the Board was warranted in concluding that the union had caused them to be discharged for dues delinquency during a period when no valid union security clause was in effect.

There is no inconsistency between the Board's decision in this case and *Retail Clerks International Assoc.* v. *Schermerhorn*, 375 U.S. 96 (Pet. 5). This Court held there that Section 14(b) of the Act (Pet. 42) empowers the States to impose restrictions on union security agreements beyond those imposed

by federal law and to enforce these additional restrictions. Contrary to petitioner, the Board did not engraft the requirements of Wisconsin law onto the union security clause here nor undertake to enforce those requirements. The Board merely gave effect to the contractual intent of the parties, *i.e.*, to make the effectiveness of the union security clause contingent upon certification by the State Board. Nothing in *Schermerhorn* precludes the Board from determining the factual question of when the parties meant the clause to take effect. Were it otherwise, the limitations in Sections 8(a)(3) and 8(b)(2) of the Act upon employer and union discrimination by reason of union non-membership would be largely meaningless.

CONCLUSION

The petition for certiorari should be denied.
Respectfully submitted.

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